(2)

No. 88-109

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN PROTEIN CORPORATION,

Petitioner,

v.

AB VOLVO and VOLVO LASTVAGNAR AB,
as Successors in Interest to Beijerinvest AB,
BEIJER INDUSTRIES, INC. and BO LYCKE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE:

WHERE THE DISTRICT COURT RESERVED DECISION ON THE DIRECTED VERDICT MOTIONS MADE AFTER THE PETITIONER'S CASE, RULING ONLY AFTER THE CLOSE OF ALL THE EVIDENCE, AND WHERE PETITIONER DID NOT, AND HAS NOT SAID THAT IT COULD HAVE PRESENTED ADDITIONAL EVIDENCE TO COMPENSATE FOR DEFICIENCIES IN ITS PROOF, WAS THE COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECT IN CONSIDERING RESPONDENTS' APPEAL ON THE MERITS OF THE DENIAL OF THEIR MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT IN THE DISTRICT COURT.

QUESTION TWO:

DID THE COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY APPLY WELL SETTLED NEW YORK LAW TO DETERMINE THE CORRECTNESS OF THE DISTRICT COURT'S RULINGS.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner American Protein Corporation and the respondents AB Volvo and Volvo Lastvagnar AB as successors in interest to Beijerinvest AB and Beijer Industries, Inc. and an individual, Bo Lycke.

Respondent AB Volvo has no parent company. AB Volvo has no subsidiaries which are publicly traded corporations in the United States.

Respondent Volvo Lastvagnar AB's parent company is AB Volvo. Volvo Lastvagnar AB has no subsidiaries which are publicly traded corporations in the United States.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
1. There is no conflict among the circuits in decisions applying Rule 50(b)	3
2. There is no substantial issue for the Court to decide	4
CONCLUSION	5

TABLE OF AUTHORITIES

Cases	Page
American Protein Corp. v. AB Volvo, 844 F.2d 56 (2nd Cir. 1988)	1
Armstrong v. Federal National Mortgage Association, 796 F.2d 366 (10th Cir. 1986)	4
Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968 (1st Cir. 1969)	3
Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578 (2nd Cir. 1987)	3
Bohrer v. Hanes Corp., 715 F.2d 213 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984)	3
Ebker v. Tan Jay International, Ltd., 739 F.2d 812 (2nd Cir. 1984)	3
Farley Transportation Co. v. Santa Fe Trail Transportation Co., 786 F.2d 1342 (9th Cir. 1985)	3
Felsen v. Sol Cafe Mfg. Corp., 24 N.Y. 2d 682 (1969)	4
Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983)	4
Miller v. Rowan Companies, Inc., 815 F.2d 1021 (5th Cir. 1987), *reh. denied*, 820 F.2d 1223 (5th Cir. 1987)	4

Page

Morgan v. Raymond Corp., 484 F.2d 1008 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974) .. 4

Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976) 4

Trujillo v. Goodman, 825 F.2d 1453 (10th Cir. 1987) 4

Rules of Court:

Fed. R. Civ. Proc. 50(b) 3, 4

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents AB Volvo ("Volvo") and Volvo Lastvagnar AB ("Lastvagnar") respectfully urge that this Court deny the petition of American Protein Corporation ("American Protein") for a writ of certiorari to review the decision of the Court of Appeals, reported at 844 F.2d 56 (2nd Cir. 1988), and reprinted in the appendix to American Protein's petition for writ of certiorari (hereinafter "Petitioner's Appendix") at A.1-18.

STATEMENT OF THE CASE

The United States District Court for the Southern District of New York, sitting in diversity, commenced the jury trial of the within action on May 20, 1987. At the close of petitioner's case all respondents made motions for directed verdicts on all counts. The Court reserved decision on the motions until the close of all the evidence. At the close of all the evidence, the District Court dismissed several counts and sent the remaining counts to the jury.

After the jury returned verdicts against respondents, respondents made post-judgment motions for judgment notwithstanding the verdict or, in the alternative, for a new trial on the grounds raised in their earlier directed verdict motions. Petitioner challenged respondents' right under Rule 50(b) of the Federal Rules of Civil Procedure to make these motions. The District Court heard the motions on the merits and denied them.

The Court of Appeals found that there was no defect in the preservation of respondents' right to make post-judgment motions, considered the appeal on the merits and entered judgment notwithstanding the motion. The Court of Appeals noted, in part, that the District Court believed that all necessary motions had been made and renewed. Further, the Court of Appeals held that renewal would have been "a pointless formality" where the trial judge had reserved decision on the directed verdict motions, finding that nothing in respondents' case strengthened petitioner's position and "[m]ore importantly, American Protein claimed neither that it would have nor that it could have presented any additional evidence to compensate for deficiencies in its proof." Petitioner's Appendix at A.13.

Petitioner now seeks review of the decision by the Court of Appeals.

REASONS FOR DENYING THE WRIT

1. There is no conflict among the circuits in decisions applying Rule 50(b).

The chief claim made by the petitioner to urge this Court's grant of a writ of certiorari is that there now exists a conflict in the circuits regarding application of Rule 50(b). Petition for Writ of Certiorari (hereinafter "Petition") at 10-20. In putative support of that claim, petitioner speculates that the Ninth Circuit would have reached a result contrary to that here. Petition at 10. Neither of petitioner's arguments has merit. In *Farley Transportation Co. v. Santa Fe Trail Transportation Co.*, 786 F.2d 1342 (9th Cir. 1985), the case touted by the petitioner as compelling a result contrary to that here, the Court of Appeals for the Ninth Circuit cites with approval *Ebker v. Tan Jay International, Ltd.*, 739 F.2d 812 (2nd Cir. 1984), the very authority relied on below to award respondents judgment.

Both *Farley* and *Ebker* hold that there is no need to renew a directed verdict motion at the close of all the evidence when the trial court reserves decision on the directed verdict motion or where defendant could not reasonably believe in light of the proof introduced that it need do nothing to be free of the risk of a judgment notwithstanding the verdict. 786 F.2d at 1346; 739 F.2d at 823-24. Both circuits thus construe Rule 50(b) consistently. There is accordingly no conflict among the circuits in the construction of Rule 50(b) warranting any clarification of Rule 50(b) standards by this Court. In *Farley* the Ninth Circuit found that the defendant did *not* fall under either *Ebker* exception; here the Court of Appeals for the Second Circuit found that respondents *had* satisfied the standards for Rule 50(b). That the Court of Appeals for the Second Circuit applied the same law to the specific facts of this case to reach its judgment is likewise no reason for this Court's review.

Both *Ebker* and *Farley*, moreover, accord completely with holdings elsewhere. *See Bayamon Thom McAn, Inc. v. Miranda*, 409 F.2d 968, 971-72 (1st Cir. 1969); *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 587 (2nd Cir. 1987); *Bohrer v. Hanes Corp.*, 715 F.2d 213, 217 (5th Cir. 1983), *cert.*

denied, 465 U.S. 1026 (1984); *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021, 1024-25 (5th Cir. 1987), *reh. denied*, 820 F.2d 1223 (5th Cir. 1987); *Morgan v. Raymond Corp.*, 484 F.2d 1008, 1010-14 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 575-577 (7th Cir. 1976); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Armstrong v. Federal National Mortgage Association*, 796 F.2d 366, 370 (10th Cir. 1986); *Trujillo v. Goodman*, 825 F.2d 1453, 1455-56 (10th Cir. 1987). The "conflict" among the circuits which petitioner urges on this Court simply does not exist. There is thus no need for this Court to issue its extraordinary writ.

2. There is no substantial issue for the Court to decide.

The District Court had jurisdiction over this matter by virtue of diversity jurisdiction. In resolving the merits of the claim under New York law that AB Volvo had tortiously interfered with petitioner's contractual relations, the Court of Appeals applied the authority of the highest court of the State of New York on the issue. Petitioner's Appendix at A.15-16. In *Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y. 2d 682 (1969), the New York Court of Appeals held that in order to prove interference with contract a plaintiff has the burden, as part of its case in chief, to show no justification for the alleged interference. In *Felsen*, as here, the court held that a parent corporation has a common economic interest with its subsidiary and that a plaintiff needed to show malice as part of its prima facie case. Petitioner disagrees with *Felsen* and with the application of *Felsen* below.

This hardly rises to a substantial issue worthy of this Court's judgment. The worst that can be said of the decision below is that it misconstrues prevailing state law. Petitioner's hysterical claim that the Court of Appeals has somehow infringed petitioner's jury trial right by applying state law amounts to no constitutional deprivation; the result is the ordinary process of judging.

When all is said and done, this petition raises no issue worthy of this Court's certiorari jurisdiction.

CONCLUSION

For all these reasons, respondents urge that American Protein's petition for a writ of certiorari be denied.

Respectfully submitted,

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